No. 04-9728

IN THE

SUPREME COURT OF THE UNITED STATES

DONALD CURTIS SAMSON -- PETITIONER

vs.

PEOPLE OF THE STATE OF CALIFORNIA -- RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does the Fourth Amendment prohibit police from conducting a warrantless search of a person who is subject to a parole search condition, where there is no suspicion of criminal wrongdoing and the sole reason for the search is that the person is on parole?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

I. Facts 2

II. Procedural History, Including When and How the Federal Question Sought to Be Reviewed Was Raised and How the California Courts Passed on It 4

REASONS FOR GRANTING THE PETITION 8

I. This Case Presents an Important Question of Fourth Amendment Law That the California Courts Have Decided in a Way That Conflicts With Decisions of Other States' Courts and Federal Courts of Appeals. 8

CONCLUSION 15

INDEX TO APPENDICES

Appendix A: Opinion of California Court of Appeal (Oct. 14, 2004)

Appendix B: Order of California Supreme Court denying review (Jan. 12, 2005)

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided this case was January 12, 2005. A copy of that decision appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

I. Facts

On September 6, 2002, at about 5:34 p.m., San Bruno (California) police officer Alex Rohleder made contact with, as he testified, "two adults and a little baby walking down the street." The two adults were petitioner Donald Curtis Samson (hereafter Mr. Samson) and a friend named Deborah Watson. Officer Rohleder recognized Mr. Samson from a prior contact. Rohleder was aware that Mr. Samson was on parole, and Rohleder "was under the impression that he might have a parolee at large warrant." Rohleder had heard that Mr. Samson once stated, during a previous contact with South San Francisco police about an incident with his girlfriend, that he would not be taken back to prison.

Upon inquiry by Rohleder, Mr. Samson confirmed that he was on parole but stated that he had already taken care of the warrant. Rohleder called the matter in and confirmed the information Mr. Samson had given him. Rohleder nonetheless decided to search Mr. Samson, because he was on parole. The search was not for officer safety. Mr. Samson had not done anything to give the officer probable cause for a search; he "was just walking down the street" with a woman who had a baby. Mr. Samson did not give the officer permission to search him. Asked whether he had searched Mr. Samson merely "because you could," the officer testified:

> Because it's a condition of his parole. I believe that being [a] parolee, that he needs to make sure he's still obeying the laws. It's a privilege for him to be out here.

Asked on cross-examination whether he searches all parolees with whom he makes contact, Rohleder testified: "It depends." He added:

> If I drive by one and I already dealt with him earlier in the day or have dealt with him, I just drive by. I have other work to do. I don't go after everybody all the time.

After waiting for a cover officer, Rohleder "conducted a parolee search" of Mr. Samson. Rohleder recovered a cigarette pack which contained, in addition to cigarettes, a "plastic baggie" containing what Rohleder believed was methamphetamine. Rohleder arrested Mr. Samson. A later test showed that the substance in the "baggie" contained methamphetamine. The substance weighed 2.17 grams, which is a usable quantity of methamphetamine.

Mr. Samson's parole agent, Bernard Martinez, testified that Mr. Samson was, indeed, on parole on September 6, 2002. Mr. Samson was subject to a search condition, which stated:

> You've agreed to search and seizure by a parole officer or other peace officer at any time of the night or day, with or without a search warrant or with or without cause.

Martinez testified that Mr. Samson was on parole for possession of a firearm by an ex-felon.

Deborah Watson testified that she and her three-year-old son, Jefferson, were walking with Mr. Samson when Officer Rohleder approached them and asked Mr. Samson whether there was a warrant for his arrest. Mr. Samson "replied: 'What?' Like hesitated, surprised." Then Rohleder told Mr. Samson to put his hands on a car. Mr.

Samson complied, and officer searched him. Later, Rohleder told Mr. Samson to take off his jacket, searched the jacket, then searched Mr. Samson a second time. He asked Ms. Watson to wait right there with her child. After going to the police car, Rohleder approached Ms. Watson, asked her some questions, and told her to empty her pockets, which she did.

According to Ms. Watson, Rohleder "did not ask me for permission. He just told me to empty my pockets out and if I had any weapons or any drugs on me." Rohleder testified that he searched Ms. Watson with her consent.[1]

II. Procedural History, Including When and How the Federal Question Sought to Be Reviewed Was Raised and How the California Courts Passed on It

The prosecution filed an information on October 11, 2002, and an amended information on December 13, 2002. The latter charged Mr. Samson with one felony count of possession of methamphetamine (Cal. Health & Safety Code § 11377(a)). The information also alleged two prior felony convictions under the Three Strikes law (Cal. Penal Code § 1170.12(c)(2)) and two prior prison terms (Cal. Penal Code § 667.5(b)). One of the prior felony convictions alleged under the Three Strikes law was stricken, at

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[1] Defense counsel asked Rohleder why he had asked Ms. Watson for consent to search her. The trial court sustained the prosecution's objection on relevance grounds. Defense counsel also asked: "Well, when you stop a parolee, do you search everyone that's with him?" The trial court again sustained a relevance objection.

the prosecution's request, on March 20, 2003. Mr. Samson pled not guilty and denied the special allegations.

Mr. Samson filed a motion under California Penal Code section 1538.5 on November 8, 2002, seeking to suppress as evidence the methamphetamine found in the cigarette pack in his shirt pocket. The motion argued that the warrantless search violated the "limited Fourth Amendment rights" retained by Mr. Samson as a parolee with a search condition. The prosecution filed written opposition. The prosecution asserted that the search was legal under *People v. Reyes*, 968 P.2d 445 (Cal. 1998), even "without any particularized suspicion of criminal activity," because Officer Rohleder "knew the Defendant was on parole" and "knew the Defendant had committed a violation of section 12021(a) of the Penal Code (felon with a gun)."

The trial court conducted a hearing on the motion to suppress on December 6, 2002, and December 13, 2002. On the latter date, the trial court announced its ruling denying the motion to suppress:

> [T]he Court finds as follows, that the defendant was on parole subject to search and seizure. That the officer had a basis in his mind to stop the defendant, while erroneous, it wasn't arbitrary or capricious. The act of searching him was within his power given the nature of the defendant's parole offense, namely, ex-felon in possession of a firearm and was certainly prudent to make the search, not only for the protection, itself, but to make sure that parolee is not in violation of the law, which, as it turns out, he was finding dope, and I don't find that his actions were capricious or arbitrary, and therefore, I deny the motion based upon the credibility and evidence of the witness.

A jury trial began on March 19, 2003. On March 24, 2003, the jury found Mr. Samson guilty. The parties agreed to a court trial on the special allegations. On the same day, the court found the allegations true. On April 21, 2003, the trial court sentenced Mr. Samson. The court imposed the upper term of three years for Mr. Samson's conviction of violating California Health and Safety Code section 11377(a), doubled to six years under the Three Strikes law (Cal. Penal Code § 1170.12(c)(1)). With the prosecution's concurrence, the trial court imposed only one of the two one-year prior prison term enhancements. The total sentence was seven years in state prison.

Mr. Samson filed a timely notice of appeal on April 21, 2003. On appeal, he renewed his argument that the search violated the Fourth Amendment. Mr. Samson asserted that (1) even under *People v. Reyes*, 968 P.2d 445 (Cal. 1998), which held that no individualized suspicion was constitutionally required to search a parolee (*id.* at 451), the search was unreasonable and violated the Fourth Amendment, because it was arbitrary, capricious and harassing (*see id.* at 450-451) (Appellant's Opening Br. at 9-14); and (2) the search was not justified by a reasonable suspicion of criminal activity, which the Fourth Amendment requires to justify a warrantless search of a parolee subject to a search clause, contrary to the majority opinion in *People v. Reyes* (Appellant's Opening Br. at 15-17).[2]

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[2] Mr. Samson also argued that the trial court awarded him too few credits for days in actual local custody and for local conduct. In supplemental briefing after this Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), Mr. Samson argued that the (continued...)

The California Court of Appeal rejected Mr. Samson's Fourth Amendment claim and affirmed his conviction, in an opinion issued on October 14, 2004.[3] The intermediate appellate court was obliged to, and did, adhere to the rule established by the California Supreme Court's majority opinion in *People v. Reyes*. Accordingly, the court rejected Mr. Samson's argument that the search of his person violated the Fourth Amendment because it was not justified by a reasonable suspicion of criminal activity. (Opn. 3-4.) The court also concluded that the search was not arbitrary, capricious or harassing. (Opn. 4-5.)[4]

Mr. Samson sought discretionary review from the California Supreme Court, asserting that the court should grant review to reconsider, and ultimately overrule, its 1998 *Reyes* holding that no particularized suspicion is required to uphold the warrantless

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[2](...continued)
trial court violated his Sixth Amendment right to jury trial when it imposed an upper term based on aggravating factors that were neither found true by a jury nor found true beyond a reasonable doubt.

[3] The Court of Appeal's opinion (hereinafter Opn.) is Appendix A to this petition.

[4] The court upheld Mr. Samson's claim of error regarding sentence credits. (Opn. 5.) It rejected his claim that the trial court's imposition of the upper term without a jury trial on aggravating factors violated the Sixth Amendment as interpreted in *Blakely v. Washington*. (Opn. 5-17.)

search of a person who is subject to a parole search condition. (Pet. for Review at 4-11.)[5]

The California Supreme Court denied review on January 12, 2005.[6]

REASONS FOR GRANTING THE PETITION

I. This Case Presents an Important Question of Fourth Amendment Law That the California Courts Have Decided in a Way That Conflicts With Decisions of Other States' Courts and Federal Courts of Appeals.

In *People v. Reyes*, 968 P.2d 445, the California Supreme Court precedent that the Court of Appeal below followed, a four-to-three majority overruled *People v. Burgener*, 714 P.2d 1251 (Cal. 1986), which had held that a warrantless search of the person or property of a parolee must, in order to survive Fourth Amendment scrutiny, be justified by at least a reasonable suspicion that the parolee has violated, or is planning to violate, the law or a parole condition. *People v. Reyes*, 968 P.2d at 446, 450-451. The *Reyes* majority held that "a parole search may be reasonable despite the absence of particularized suspicion." *Id.* at 451.

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[5] Mr. Samson also sought review of the court of appeal's denial of his Sixth Amendment jury trial claim under *Blakely v. Washington*. (Pet. for Review at 11-23.)

[6] The order denying review is Appendix B to this petition. With regard to the issue under *Blakely v. Washington*, the order specified that the denial of review was without prejudice to any relief to which Mr. Samson might be entitled after the California Supreme Court decides two pending cases on the application of *Blakely* to California law.

In her *Reyes* dissent, California Supreme Court Associate Justice Joyce Kennard pointed out that most courts which have considered the issue have held that a suspicionless search of a parolee by a police officer violates the Fourth Amendment:

> To summarize, state and federal courts that have considered the validity of parole or probation searches have generally adopted either a reasonable suspicion requirement, as this court did in *Burgener, supra*, 41 Cal.3d 505, or a rule barring searches when the parole or probation officer was acting as an agent of the police, or they have adopted both rules.

People v. Reyes, 968 P.2d at 456 (Kennard, J., concurring and dissenting).

Several years after *Reyes* was decided, this Court noted, but did not decide, the question whether the Fourth Amendment would allow the search of a *probationer* with no individualized suspicion of criminal wrongdoing. The Court held that probable cause was not required to justify the warrantless search of a probationer who was subject to a search condition; reasonable suspicion was enough. "When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." *United States v. Knights*, 534 U.S. 112, 121 (2001). The Court stated that it "need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion." *Id.* at 120 n.6.

In the wake of *Knights*, several lower courts have held that the *Knights* rule applies to parolees as well as probationers. *See, e.g., Knox v. Smith*, 342 F.3d 651, 657 (7th Cir.

2003) (seizure of parolee "based only on reasonable suspicion" that he had violated terms of release agreement would satisfy Fourth Amendment); *United States v. Loney*, 331 F.3d 516, 520-21 (6th Cir. 2003) ("it is now beyond question that a state statute survives Fourth Amendment scrutiny if it authorizes searches of parolees based on a reasonable suspicion that an individual is violating the terms or conditions of parole"). Probationers and parolees often are treated alike for Fourth Amendment purposes. *See, e.g., Moreno v. Baca*, 400 F.3d 1152, 2005 U.S. App. LEXIS 3739, *17-*18 (9th Cir. 2005); *United States v. Tucker*, 305 F.3d 1193, 1199 n.1 (10th Cir. 2002); *United States v. Thomas*, 729 F.2d 120, 125 n.1 (2d Cir. 1984). *Cf. People v. Woods*, 981 P.2d 1019, 1031 (Cal. 1999) (Brown, J., dissenting) (criticizing majority opinion on ground that it "reintroduces a disparity between parolees and juvenile probationers on the one hand, and adult probationers on the other").

The question about suspicionless searches left open by *Knights* has, however, been decided differently in the various state and lower federal courts. The California courts, including the Court of Appeal below, continue to follow the *Reyes* holding that the Fourth Amendment allows the police to search a person who has a parole search condition, with *no* particularized suspicion, "reasonable" or otherwise. (Opn. 4); *People v. Zichwic*, 114 Cal. Rptr. 2d 733, 740 (Cal. Ct. App. 2001) ("*Knights* did not cite *Reyes* and did not reach the issue decided in *Reyes*, that a parole search does not require a particularized suspicion. As an intermediate state appellate court, we, of course, are bound by decisions of the California Supreme Court."). *Cf. People v. Sanders*, 73 P.3d 496, 506 (Cal. 2003)

(reiterating *Reyes* holding but noting contrary Ninth Circuit panel decision, described below).

Courts of other states and of federal circuits have continued, after *Knights*, to reach conclusions contrary to that of the *Reyes* majority, as Justice Kennard noted the majority of jurisdictions had before *Reyes*. Louisiana, for example, requires that even a *parole officer* harbor a "reasonable suspicion" of criminal activity before searching a parolee without a warrant. *State v. Bonner*, 811 So. 2d 1151, 1153-54 (La. Ct. App. 2002) ("While the decision to conduct a warrantless search of a parolee and his home must be based on something more than a mere hunch, probable cause is not required, and only a reasonable suspicion that criminal activity is occurring is necessary for a parole officer to conduct a warrantless search."). Pennsylvania requires that the warrantless search of a parolee be performed by a parole officer, and it requires both a "reasonable suspicion to believe that the parolee committed a parole violation" and that the search be reasonably related to the parole officer's duties. *Commonwealth v. Hughes*, 836 A.2d 893, 899 (Pa. 2003).

The Sixth Circuit has been even more protective of parolees' Fourth Amendment rights. In *United States v. Carnes*, 309 F.3d 950 (6th Cir. 2002), a panel majority concluded that government agents required both a warrant and probable cause to seize and listen to audio tapes, found at the home of a parolee's girlfriend after the parolee's arrest there, which were used against the parolee at trial. *Id.* at 953, 956, 959-960, 963. A dissenting judge would have held that only a reasonable suspicion of a crime or parole

violation was required. *Id.* at 964 (Kennedy, J., dissenting.) That judge wrote: "I read *Knights* as creating a categorical rule that searches of parolees and probationers subject to search conditions require reasonable suspicion of the commission of a crime or parole violation, not probable cause." *Id.* That rule is the one urged by Mr. Samson in the instant case, but it is contrary to the California rule, which holds that no particularized suspicion is required for a parole search.

Whether or not California's rule, as stated in the *Reyes* majority opinion, is correct has been the subject of sharp conflict among the judges of the United States Court of Appeals for the Ninth Circuit. In 2003, a divided three-judge panel held that the standard embraced by the *Reyes* majority does not comport with the Fourth Amendment and that the search of a parolee's home pursuant to a parole condition is unreasonable if it is not supported by a reasonable suspicion of wrongdoing. *United States v. Crawford*, 323 F.3d 700, 715-16 (9th Cir. 2003). The Ninth Circuit granted rehearing en banc, and in June 2004, the court affirmed the defendant's conviction on the ground that, even if the search violated the Fourth Amendment, the defendant's subsequent statement to police was not a product of that search and did not have to be suppressed. *United States v. Crawford*, 372 F.3d 1048, 1052, 1057-59 (9th Cir. 2004). The majority opinion specifically noted: "We need not and do not decide . . . whether suspicionless parole searches violate the Fourth Amendment." *Id.* at p. 1054. Five concurring judges would have held that the search did not violate the Fourth Amendment; three dissenting judges would have held that it did. *Id.* at 1062-76 (Trott, J., concurring); *id.* at 1082-97 (W. Fletcher, J., dissenting).

The disagreement among Ninth Circuit judges was on display again last month in *Moreno v. Baca*, 400 F.3d 1152, 2005 U.S. App. LEXIS 3739. In that case, a civil rights action under section 1983, the plaintiff alleged that sheriff's deputies deprived him of his constitutional rights when they arrested and searched him without cause. 2005 U.S. App. Lexis 3739, *1. At the time of the detention, the plaintiff was a parolee subject to a warrantless search condition. *Id.* at *4-*5. Despite this, the panel majority opined that the plaintiff's Fourth Amendment rights "clearly included the right to walk along a public sidewalk unmolested by law enforcement" (*id.* at *22) and that he "certainly had a legitimate expectation of privacy with respect to the contents of his pockets" (*id.* at *26). Regarding the level of suspicion required to justify the warrantless search of a parolee who has a search condition, the majority concluded:

> Taking into account the reduced privacy rights enjoyed by parolees and the State's interest in rehabilitating parolees and deterring crime, we hold that the Constitution requires that a law enforcement officer must, at minimum, have a reasonable suspicion that a parolee has engaged in criminal wrongdoing or violated his parole prior to arresting him or conducting a search of his person.

Id. at *31.

Although the judgment in *Moreno v. Baca* was unanimous, one judge criticized the above-quoted language as "a bit of dictum" and as legally incorrect. *Id.* at *55-*56, *61-*62 (Clifton, J., concurring in judgment). That judge, who had joined Judge Trott's concurring opinion in *United States v. Crawford*, 372 F.3d 1048, adhered to the view that "a law enforcement officer's search of a parolee's residence is reasonable so long as the

search is not 'arbitrary, capricious, or harassing.'" *Moreno v. Baca*, 2005 U.S. App. Lexis 3739, *55-*56 (Clifton, J., concurring in judgment), quoting *Crawford*, 372 F.3d at 1063 (Trott, J., concurring).

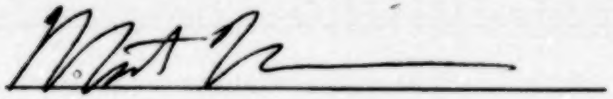
The instant case is well-suited to serve as a vehicle for resolving the conflict, because it starkly presents the issue whether the Fourth Amendment required that Officer Rohleder harbor a reasonable suspicion of criminal wrongdoing before he could search Mr. Samson's person. There is no issue in this case as to whether the officer *did*, in fact, harbor such suspicion; neither the prosecution nor the trial court asserted that such suspicion existed. Indeed, the officer admitted on the witness stand that he had no reason to suspect that Mr. Samson was doing anything illegal. As the Court of Appeal noted, "[t]he warrantless search was predicated entirely upon defendant's parole status." (Opn. 5.) This Court should grant certiorari in the instant case to decide the recurring question whether or not a parolee with a search condition may constitutionally be subjected to a warrantless search with no individualized suspicion of criminal wrongdoing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARTIN KASSMAN
(Counsel of Record)



Attorney for Petitioner
DONALD CURTIS SAMSON

Date: April 12, 2005

Filed 10/14/04

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

FILED
Court of Appeal First Appellate District
OCT 14 2004
Diana Herbert, Clerk
By _____ Deputy Clerk

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD CURTIS SAMSON,

Defendant and Appellant.

A102394

(San Mateo County
Super. Ct. No. SC052426)

Following denial of defendant's motion to suppress evidence (Pen. Code, § 1538.5) gathered pursuant to a parole search and a trial before a jury, he was found guilty of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). The trial court found that defendant committed a charged prior conviction (Pen. Code, § 1170.12, subd. (c)(1)), and served prior prison terms (Pen. Code, § 667.5, subd. (b)).[1] On appeal, he again contests the validity of the parole search, and claims that the trial court erred in its calculation of sentence credits. In a supplemental brief he has complained of the violation of his Sixth Amendment right to a jury trial due to the trial court's imposition of an upper term of imprisonment. We find that the search was lawful pursuant to a condition of defendant's parole, and any violation of his jury trial right by imposition of an upper term was not prejudicial, but the calculation of sentence credits

[1] All further statutory references are to the Penal Code.

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was in error. We therefore direct the trial court to amend the judgment to add three days of sentence credits, but otherwise affirm the judgment.

STATEMENT OF FACTS[2]

On the afternoon of September 6, 2002, Officer Alex Rohleder of the San Bruno Police Department observed "two adults and a little baby walking down the street." One of the adults was defendant, whom Officer Rohleder recognized "from a prior contact." The officer was aware that defendant was on parole and heard from other officers that he "might have a parolee at large warrant." The officer therefore parked his patrol vehicle and "made contact" with defendant.

Officer Rohleder asked defendant if "he had a warrant at that time." Defendant replied, "no, he didn't. He had already taken care of it." Defendant added that he "was in good standing with his parole agent." Rohleder determined that defendant was not subject to a parole warrant, but nevertheless "conducted a parolee search" as he waited for a cover officer. He knew that during a previous contact with South San Francisco officers defendant warned that the police "weren't going to take him back to prison," but neither defendant's conduct nor officer safety caused him to undertake the search. The sole reason for the search, according to Officer Rohleder, was that defendant was "on parole." He explained: "Because it's a condition of his parole. I believe that being [a] parolee, that he needs to make sure he's still obeying the laws. It's a privilege for him to be out here."[3] Officer Rohleder testified that he does not search all parolees "all the time," but does conduct parole searches "on a regular basis" unless he has "other work to do" or already "dealt with" the parolee. The officer intended to discharge defendant after the parole search "if he had nothing on him illegal."

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[2] Given that appellant has challenged only the propriety of the parole search and the sentence imposed, we will recite only the facts pertinent to the validity of the search, which were presented at the hearing on the motion to suppress.

[3] Appellant's condition of parole stated that he agreed to "search and seizure by a parole officer or other peace officer at any time of the night or day, with or without a search warrant or with or without cause." "Such conditions are now automatic, and imposed on every parolee." (*People v. Lewis* (1999) 74 Cal.App.4th 662, 668.)

Officer Rohleder found a cigarette box in defendant's left breast pocket. Inside the box was a plastic baggie that contained methamphetamine. Defendant was immediately placed under arrest.

Officer Rohleder testified that he then asked defendant's companion, Deborah Watson, for permission to search her, and she agreed. Nothing was found in her possession, and she was not detained.

Watson testified for the defense that as she and defendant were walking to a friend's house with her three-year-old son, Officer Rohleder approached and asked defendant "if he had a warrant for his arrest." Defendant did not say anything to the officer. Rohleder told appellant to "put his hands up on the car," and remove his jacket. He searched the jacket, then searched defendant "again a second time." According to Watson, the officer did not ask permission to search her, but rather told her to empty her pockets, and asked if she had any weapons or drugs. Officer Rohleder "went through" Watson's "belongings on the top of the hood of the car," then told her to "go home."

DISCUSSION

I. The Validity of the Parole Search.

Defendant argues that the officer did not conduct a valid parole search. He makes a two-pronged argument: First, that the search was not justified by a reasonable "individualized suspicion" of criminal activity; and second, that the search was "arbitrary, capricious and harassing."

Established law contravenes defendant's contention that a parole search must be based upon reasonable suspicion of criminal activity by the parolee. "In *People* v. *Reyes* (1998) 19 Cal.4th 743 [], the court overruled a previous decision, *People* v. *Burgener* (1986) 41 Cal.3d 505 [], and held that an adult *parolee* subject to a search condition could be searched even if the searching officers did not have a reasonable suspicion that the parolee had violated or was planning to violate either the law or the conditions of parole. Subject to the same proviso from [*In re Tyrell J.* (1994) 8 Cal.4th 68] about arbitrary, capricious, or harassing searches, '[w]here the search is for a proper purpose, we hold that, even in the absence of particularized suspicion, a search conducted under the

auspices of a properly imposed parole search condition does not intrude on any expectation of privacy "society is 'prepared to recognize as legitimate.' " [Citations.]' [Citation.]" (*People v. Lewis, supra,* 74 Cal.App.4th 662, 667-668; see also *People v. Cervantes* (2002) 103 Cal.App.4th 1404, 1407-1408.) Thus, "reasonable suspicion is no longer a prerequisite to conducting a search of the subject's person or property. Such a search is reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing," and does not exceed the scope of the consent. (*People v. Reyes, supra,* at p. 752; see also *People v. Lewis, supra,* at pp. 667-668; *People v. Reed* (1994) 23 Cal.App.4th 135, 141; *People v. Velasquez* (1993) 21 Cal.App.4th 555, 558.)

Despite defendant's protest that the majority opinion in *Reyes* "is incorrect" and contrary to the position taken by other courts, "[a]s an intermediate state appellate court, we, of course, are bound by decisions of the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 []; *People v. Superior Court (Persons)* (1976) 56 Cal.App.3d 191, 194 [].)" (*People v. Zichwic* (2001) 94 Cal.App.4th 944, 952-953; see also *People v. Superior Court (Moore)* (1996) 50 Cal.App.4th 1202, 1211; *People v. Brackett* (1994) 25 Cal.App.4th 488, 501.) We therefore conclude that the parole search of defendant did not require a particularized suspicion of criminal activity. (*People v. Zichwic, supra,* at pp. 952-953.)

We turn to defendant's argument that the parole search was "arbitrary, capricious and harassing" under the standard articulated in *Reyes*. "A search is arbitrary 'when the motivation for the search is unrelated to rehabilitative, reformative or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee.' (*People v. Reyes, supra*, 19 Cal.4th at p. 754.) A search is a form of harassment when its motivation is a mere whim or caprice." (*People v. Cervantes, supra,* 103 Cal.App.4th 1404, 1408.) "It may be unreasonable ' "if made too often, or at an unreasonable hour, or if unreasonably prolonged." ' [Citation.]" (*People v. Zichwic, supra,* 94 Cal.App.4th 944, 951, quoting from *People v. Reyes, supra,* at pp. 753-754; see also *People v. Bremmer* (1973) 30 Cal.App.3d 1058, 1062.)

We find nothing arbitrary or capricious in the search. "It is only when the motivation for the search is wholly arbitrary, when it is based merely on a whim or caprice or when there is no reasonable claim of a legitimate law enforcement purpose, e.g., an officer decides on a whim to stop the next red car he or she sees, that a search based on a [parole] search condition is unlawful." (*People v. Cervantes, supra,* 103 Cal.App.4th 1404, 1408.) Officer Rohleder did not detain defendant indiscriminately or at his whim, but rather recognized him as a parolee, and thought he may be subject to an outstanding "parolee at large warrant." The lawful basis for the search did not dissipate when the officer learned the warrant was not active. Nor was the officer compelled to rely upon "officer safety" to undertake the search.[4] The warrantless search was predicated entirely upon defendant's parole status, not the warrant or the need for officer safety. And a legitimate law enforcement purpose for a parole search was expressed by Officer Rohleder: to determine whether defendant, as a parolee, was "still obeying the laws." If defendant "had nothing on him illegal," the officer intended to release him. The testimony by Officer Rohleder that he customarily searches identified parolees does not demonstrate arbitrariness, and indicates that the search was not conducted by the officer for the purpose of harassment or due to any personal animosity toward defendant. (*People v. Reed, supra,* 23 Cal.App.4th 135, 143.) Finally, the record shows that the search was not unreasonable in duration or the circumstances of its execution. We therefore conclude that the search of defendant was lawful.

II. The Calculation of Sentence Credits.

Defendant also argues that he is entitled to "an additional 3 days" of sentence credits, for a total of 342 days. The Attorney General concedes that an error in the calculation of sentence credits was committed, and upon review of the record we agree.

III. The Imposition of an Upper Term.

We have granted defendant the opportunity to submit a supplemental brief to present the argument that under the recent United States Supreme Court decision in

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[4] In fact, Rohleder discounted officer safety as a reason for the search.

Blakely v. Washington (2004) 542 U.S. ___ [159 L.Ed.2d 403, 124 S.Ct. 2531], (*Blakely*), the trial court erred by imposing an upper term for his possession of methamphetamine conviction without an admission or supporting finding made by the jury beyond a reasonable doubt. He maintains that under the *Blakely* opinion the jury verdict, "standing alone," did not authorize the upper term selected as a sentence choice by the trial court. He adds that, "California's sentencing scheme required the trial court to impose the middle term, unless it justified a departure by reference to factors other than those necessarily found by the jury – just as the Washington statutory scheme involved in *Blakely* required an 'exceptional' sentence to be justified by reference to factors other than those used in computing the standard range sentence." Therefore, he complains that imposition of upper term upon him violated his constitutional rights as defined in *Blakely*.[5]

We first dispose of respondent's contention that defendant "forfeited" any claim of *Blakely* error by failing to "request a jury trial" to determine the existence of a fact that may increase his sentence. "Claims of error relating to sentences 'which, though otherwise permitted by law, were imposed *in a procedurally* or factually *flawed manner*' are waived on appeal if not first raised in the trial court." (*People v. Brach* (2002) 95 Cal.App.4th 571, 577; see also *People v. Breazell* (2002) 104 Cal.App.4th 298, 304-305.) According to a fundamental principle of appellate procedure, "with certain exceptions, an appellate court will not consider claims of error that could have been—but were not—raised in the trial court." (*People v. Vera* (1997) 15 Cal.4th 269, 275.) " '[A]n appellate court should not take notice of matters not first presented to and considered by the trial court, where to do so would unfairly permit "one side to press an issue or theory on appeal that was not raised below." [Citation.]' [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 171.) " 'Generally speaking, the rationale underlying the rule requiring

[5] We are of course aware that the effect of *Blakely, supra*, 542 U.S. __ [124 S.Ct. 2531], on California sentencing law is already before the California Supreme Court in *People v. Black*, review granted July 8, 2004, S126182, and *People v. Towne*, review granted June 18, 2004, S125677.

objection below as a prerequisite to complaint on appeal regarding some error by the trial court is predicated on the premise that, in its absence, the People would be deprived of the opportunity to cure the defect in the trial court and the defendant would be allowed to gamble on a favorable result—secure in the knowledge that if he did not prevail there, he would be able to prevail on appeal. . . .' [Citation.]" (*People v. Zamarron* (1994) 30 Cal.App.4th 865, 870; see also *People v. McClellan* (1993) 6 Cal.4th 367, 377.) The waiver doctrine also seeks to " ' "encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided . . . ." ' [Citation.]" (*People v. Peel* (1993) 17 Cal.App.4th 594, 600.)

"The California Supreme Court has repeatedly held" that even "constitutional objections must be interposed before the trial judge in order to preserve such contentions for appeal." (*People v. Rudd* (1998) 63 Cal.App.4th 620, 628, citing *People v. Williams* (1997) 16 Cal.4th 153, 250; *People v. Padilla* (1995) 11 Cal.4th 891, 971; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20; *People v. Garceau* (1993) 6 Cal.4th 140, 173-174; *People v. McPeters* (1992) 2 Cal.4th 1148, 1174; *People v. Ashmus* (1991) 54 Cal.3d 932, 972-973, fn. 10.) " ' "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." [Citation.]' [Citation.]" (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. omitted; see also *People v. Rudd, supra,* at p. 629.)

However, "Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera, supra,* 15 Cal.4th 269, 276.) Further, failure to object does not prevent correction or vacation of an "unauthorized sentence" on appeal. (*In re Birdwell* (1996) 50 Cal.App.4th 926, 931.) "An unauthorized sentence is a narrow exception to the requirement that the parties raise their claims in the trial court to preserve the issue for appeal." (*People v. Breazell, supra,* 104 Cal.App.4th 298, 304.) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance

in the particular case. Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*People v. Scott* (1994) 9 Cal.4th 331, 354; see also *People v. Breazell, supra,* at p. 304; *People v. McGee* (1993) 15 Cal.App.4th 107, 117.) "Claims involving unauthorized sentences or sentences entered in excess of jurisdiction can be raised at any time." (*People v. Andrade* (2002) 100 Cal.App.4th 351, 354; see also *People v. Turner* (2002) 96 Cal.App.4th 1409, 1415.) A related exception to the waiver rule is that it "is generally not applied when the alleged error involves a pure question of law, which can be resolved on appeal without reference to a record developed below." (*People v. Williams* (1999) 77 Cal.App.4th 436, 460.)

In the present case defendant has presented a claim of deprivation of the fundamental constitutional rights to jury trial and proof beyond a reasonable doubt. (*People v. Holmes* (1960) 54 Cal.2d 442, 443-444.) The constitutional challenge raised by defendant is an issue of law that we may decide without reference to the particular sentencing record developed in the trial court. (*In re Justin S.* (2001) 93 Cal.App.4th 811, 815.) And if his position is found to have merit, the sentence may not lawfully be imposed under any circumstances without a jury trial, and as an unauthorized component of his disposition may be corrected on appeal despite the lack of an objection in the trial court. (*Ibid.*; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 268, fn. 2; *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534; *People v. Chambers* (1998) 65 Cal.App.4th 819, 823; *In re Paul R.* (1996) 42 Cal.App.4th 1582, 1590; *People v. Sexton* (1995) 33 Cal.App.4th 64, 69.) Finally, *Blakely* was decided after defendant was sentenced, and therefore he had no reason to object in the face of previously established law that unfailingly declared a defendant has no constitutional right to a jury trial in connection with the imposition of an upper term of imprisonment. (See *People v. Ochoa* (2004) 121 Cal.App.4th 1551, 1565; *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231; *People v. Ramos* (1980) 106 Cal.App.3d 591, 605-606; *People v. Williams* (1980) 103 Cal.App.3d 507, 510; *People v. Betterton* (1979) 93 Cal.App.3d 406, 410-411; *People v. Nelson* (1978) 85 Cal.App.3d 99, 102-103; *U.S. v. Harrison* (8th Cir.

2003) 340 F.3d 497, 500.) We cannot find that he voluntarily and intelligently relinquished a known right, or forfeited his right to object on appeal by failing specifically to raise an objection in a timely fashion. We therefore conclude that defendant has not waived his right to complain of denial of the right to a jury trial under *Blakely*, and despite the lack of an objection below elect to address his constitutional claims on their merits. (*People v. Ochoa, supra*, at p. 1565; *People v. Peck* (1996) 52 Cal.App.4th 351, 362, fn. 5; see also *People v. Marshall* (1996) 13 Cal.4th 799, 831-832; *People v. Ashmus, supra*, 54 Cal.3d 932, 976; *In re Khonsavanh S.* (1998) 67 Cal.App.4th 532, 537; *People v. Williams* (1998) 61 Cal.App.4th 649, 657.)

In *Blakely*, the United States Supreme Court revisited the rule articulated in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." (*Blakely, supra*, 124 S.Ct. 2531, 2536, italics added.) At issue in *Blakely* was whether the determinate sentencing procedure in the State of Washington deprived the defendant of his "federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence." (*Id.* at p. 2536.) The petitioner entered a guilty plea to second-degree kidnapping of his estranged wife in which he admitted domestic violence and use of a firearm, but "no other relevant facts." (*Id.* at pp. 2534-2535.) Under the Washington Criminal Code (§§ 9A.40.030(3); 9A.20.021(1)(b)), second-degree kidnapping was designated a class B felony that carried a maximum statutory sentence of 10 years. (*Blakely, supra*, at p. 2535.) The governing Washington sentencing guidelines further limited the presumptive "standard range" to 49-53 months, but authorized the judge to impose a sentence above the specified range, although below the 10-year maximum, upon a finding by a preponderance of the evidence of "substantial and compelling reasons justifying an exceptional sentence." (*Ibid.*, citing Wash. Rev. Code § 9.94A.120(2)). At the sentencing proceeding, an "exceptional sentence" of 90 months was imposed, based upon the trial judge's finding that the petitioner used "deliberate cruelty" in the commission of the offense, which was one of the statutorily

enumerated grounds for departure from the standard sentencing range. (*Blakely, supra*, at p. 2535.)[6]

The court in *Blakely* reaffirmed the commitment articulated in its prior decisions in *Apprendi, supra*, 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584, "to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." (*Blakely, supra*, 124 S.Ct. 2531, 2538-2539.) The Sixth Amendment, declared the court, "is not a limitation on judicial power, but a reservation of jury power." (*Id.*, at p. 2540.) The court further observed that "*Apprendi* carries out this design by ensuring that the judges' authority to sentence derives wholly from the jury's verdict." (*Id.*, at p. 2539.)

The court in *Blakely* operated from the essential conclusion reached in both its *Apprendi* and *Ring* decisions that a defendant's constitutional rights have been violated when a judge "impose[s] a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. *Apprendi, supra*, at 491-497, 120 S.Ct. 2348; *Ring, supra*, at 603-609, 122 S.Ct. 2428." (*Blakely, supra*, 124 S.Ct. 2531, 2537.) The notion advocated by the State in *Blakely* "that there was no *Apprendi* violation because the relevant 'statutory maximum' is not 53 months, but the 10-year maximum for class B felonies in § 9A.20.021(1)(b)," and "no exceptional sentence may exceed that limit," was rejected as contrary to those "clear" precedents. (*Blakely, supra*, 124 S.Ct. 2531, 2537.) Instead, the court defined "the 'statutory maximum' for *Apprendi* purposes" as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow,

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[6] Under the Washington Sentencing Reform Act, the factors that may be relied upon to justify a finding of an exceptional sentence are listed, but the list is illustrative not exhaustive. A factor may be taken into consideration to impose an exceptional sentence only if it is not already taken into account in the calculation of the standard range sentence for the offense. (*Blakely, supra*, 124 S.Ct. 2531, 2535.)

the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Ibid*; see also *United States v. Ameline* (9th Cir. 2004) 376 F.3d 967, 975.)

The court then concluded: "The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, '[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense,' [citation], which in this case included the elements of second-degree kidnapping and the use of a firearm, see §§ 9.94A.320, 9.94A.310(3)(b). Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. See § 9.94A.210(4). The 'maximum sentence' is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator)." (*Blakely, supra*, 124 S.Ct. 2531, 2537-2538, fn. omitted.) "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." (*Blakely, supra,* at p. 2538.) "Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." (*Blakely, supra*, at p. 2538, fn. 8.)

Without deciding that defendant's constitutional rights pursuant to the *Blakely* opinion were violated, we find that he did not suffer prejudice from the imposition of the upper term upon him without a separate finding by the jury of aggravating circumstances beyond a reasonable doubt. We do not, as defendant urges, consider the denial of *Blakely*

jury trial rights during sentencing proceedings to be of such fundamental, structural magnitude to require reversal "without regard to prejudice." And we conclude under a harmless error analysis that defendant would have been sentenced to an upper term even without the trial court's finding of any aggravating factors in violation of *Blakely*.

In *Arizona v. Fulminante* (1991) 499 U.S. 279, "a majority of the high court, in discussing the applicable harmless error standard for constitutional errors, distinguished 'trial error,' that is, an error which 'occur[s] during the presentation of the case to the jury,' from 'structural defects,' such as denial of a public trial, which 'affect[] the framework within which the trial proceeds, rather than simply an error in the trial process itself.' The former errors are subject to *Chapman* analysis (see *Chapman* v. *California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711, 87 S.Ct. 824, 24 A.L.R.3d 1065] [error or deprivation must be shown harmless beyond reasonable doubt]), whereas the latter errors are deemed reversible per se." (*People v. Woodward* (1992) 4 Cal.4th 376, 387.) "There is a strong presumption any error falls within the [former] category, and it is the rare case in which a constitutional violation will not be subject to harmless error analysis." (*People v. Marshall, supra,* 13 Cal.4th 799, 851.) "In only a few cases has the Supreme Court found a constitutional violation which is not subject to harmless error analysis." (*People v. Evans* (1998) 62 Cal.App.4th 186, 194.)

The United States Supreme Court has " 'recognized that "most constitutional errors can be harmless." [Citation.] "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." [Citation.] Indeed, we have found an error to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." ' " (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1210, citing *Johnson v. United States* (1997) 520 U.S. 461, 468 [].) " 'The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has

been satisfied and the judgment should be affirmed.' " (*People v. Flood* (1998) 18 Cal.4th 470, 492, citing *Rose v. Clark* (1986) 478 U.S. 570, 579.)

We recognize that where the right to a jury trial is " 'altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.' [Citation.]" (*People v. Avila* (1995) 35 Cal.App.4th 642, 656, fn. omitted; see also *People v. Collins* (2001) 26 Cal.4th 297, 312-313.) "Where demonstration of prejudice is ' "a practical impossibility, prejudice must necessarily be implied." ' [Citation.]" (*People v. Molina* (2000) 82 Cal.App.4th 1329, 1333.)

But here, the denial of the rights to a jury trial to proof beyond a reasonable doubt are only associated with the finding of one or perhaps two among many aggravating circumstances that contributed to the selection of the upper term, not the structure of the trial itself that resulted in the guilty verdict and imposition of sentence. Defendant was tried and found guilty by a fairly selected, impartial jury. He was represented by counsel and received a full opportunity to elicit evidence and offer argument to an impartial judge to support imposition of a middle or lower term. Placed in context, the lack of a jury finding of an aggravating circumstance does not rise to the level of an error that automatically requires reversal of an otherwise valid sentence. (See *Rose v. Clark, supra,* 478 U.S. 570, 579; *People v. Evans, supra,* 62 Cal.App.4th 186, 197.) The nature of the error also permits a quantitative assessment of prejudice in the context of the evidence presented in order to determine whether the error was harmless. (*Arizona v. Fulminante, supra,* 499 U.S. 279, 307-308; *People v. Marshall, supra,* 13 Cal.4th 799, 851.) We find that any sentencing error under *Blakely* is not a structural defect that demands automatic reversal. (See *People v. Epps* (2001) 25 Cal.4th 19, 29; *People v. Vera, supra,* 15 Cal.4th 269, 278; *People v. Marshall, supra,* at pp. 851-852.) Rather, we follow the standard of review for federal constitutional errors (*Chapman v. California, supra,* 386 U.S. 18, 24), and must reverse the sentence unless it appears beyond a reasonable doubt that the assumed error did not contribute to the verdict. (*People v. Neal* (2003) 31 Cal.4th 63, 86;

People v. Carter (2003) 30 Cal.4th 1166, 1221-1222; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)

Our review of the record discloses that to impose the upper term upon defendant the trial court properly relied upon numerous aggravating factors that do not fall within the reach of the right to a jury trial articulated in *Blakely*. Defendant's record of prior offenses, including multiple crimes of violence, is lengthy and unrelenting. As aggravating factors to support the sentence choice, the court cited – in addition to lack of remorse and failure to take advantage of treatment programs – defendant's "record of prior convictions, some of which involve violent conduct; his prior service of prison terms; his lack of satisfactory performance while on parole;" and his "prior conduct while on parole, including five parole violations." No mitigating factors were cited by the court or mentioned in the probation report.

The aggravating factors that relate to defendant's prior convictions and other recidivist conduct did not implicate his right to a jury trial under the current state of the law. In *Apprendi* the court specifically declared that based on its prior decision in *Almendarez-Torres v. United States* (1998) 523 U.S. 224, "*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi, supra,* 530 U.S. 466, 490, italics added; see also *People v. Taylor* (2004) 118 Cal.App.4th 11, 28; *People v. Superior Court* (*Andrades*) (2003) 113 Cal.App.4th 817, 831; *People v. Lee* (2003) 111 Cal.App.4th 1310, 1314.) Thus, "[b]y its terms, the holding of *Apprendi* does not apply to 'the fact of a prior conviction . . . .' [Citation.]" (*People v. Taylor, supra,* at p. 28.) "*Apprendi* was absolutely clear in excepting the fact of prior convictions from its new rule." (*Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, 154.)

Nothing articulated in the *Blakely* opinion casts doubt upon the exclusion in *Apprendi* of prior conviction allegations from the constitutional right to jury trial, and the California Supreme Court has steadfastly declared that neither the federal nor state constitutions confer the right to have a jury determine any factual issues relating to prior

convictions alleged for purposes of sentencing enhancement. (*People v. Epps, supra,* 25 Cal.4th 19, 23; *People v. Kelii* (1999) 21 Cal.4th 452, 455; *People v. Vera, supra,* 15 Cal.4th 269, 277; *People v. Wiley* (1995) 9 Cal.4th 580, 585; *People v. McGee* (2004) 115 Cal.App.4th 819, 828.) Even in the aftermath of *Apprendi* our high court held: "The right, if any, to a jury trial of prior conviction allegations derives from sections 1025 and 1158, not from the state or federal Constitution." (*People v. Epps, supra,* at p. 23; see also *People v. Belmares* (2003) 106 Cal.App.4th 19, 27.)

The exception has also been found to apply not only to the fact of a prior conviction, but to "an issue of recidivism which enhances a sentence and is unrelated to an element of a crime." (*People v. Thomas* (2001) 91 Cal.App.4th 212, 223; see also *People v. Taylor, supra,* 118 Cal.App.4th 11, 28-29.) A narrow reading of the *Apprendi* language to apply to nothing more than the "fact of a prior conviction" fails to consider the bases for the exception, and "takes that language out of its context." (*People v. Thomas, supra,* at p. 216.) A reason for the exemption of prior convictions from the scope of the jury trial requirement for increased sentences, explained the court, is that "procedural safeguards attached to any 'fact' of prior conviction." (*Apprendi, supra,* 530 U.S. 466, 488; see also *People v. Lee, supra,* 111 Cal.App.4th 1310, 1314.) The court further emphasized that the fact of a prior conviction " 'does not relate to the commission of the offense.' " (*Apprendi, supra,* at pp. 488, 496, quoting *Almendarez-Torres v. United States, supra,* 523 U.S. 224, 230, 244; see also *People v. Taylor, supra,* at p. 29.) And finally, the court "excepted the fact of a prior conviction from this holding, because of the long tradition allowing sentencing judges to consider the defendant's recidivism." (*People v. Bowden* (2002) 102 Cal.App.4th 387, 392, italics omitted; see also *Jones v. United States* (1999) 526 U.S. 227, 249.) "[R]ecidivism 'is as typical a sentencing factor as one might imagine.' " (*Castillo v. United States* (2000) 530 U.S. 120, 126.)

"[C]ourts have construed *Apprendi* as requiring a jury trial except as to matters relating to 'recidivism.' Courts have not described *Apprendi* as requiring jury trials on matters other than the precise 'fact' of a prior conviction. Rather, courts have held that no jury trial right exists on matters involving the more broadly framed issue of

'recidivism.' [Citations.] Appellate courts have held that *Apprendi* does not require full due process treatment to recidivism allegations which involved elements merely beyond the fact of conviction itself." (*People v. Thomas, supra,* 91 Cal.App.4th 212, 221-222; see also *People v. Belmares, supra,* 106 Cal.App.4th 19, 27-28.)

Thus, in *People v. Thomas, supra,* 91 Cal.App.4th 212, the court concluded that under *Apprendi* the defendant was not entitled to a jury trial on two prior prison term allegations. Following an analysis of *Apprendi* and its predecessor *Almendarez-Torres v. United States, supra,* 523 U.S. 224, 226, the court declared: "With the foregoing legal analysis in mind, we reach the following conclusions. In terms of recidivism findings that enhance a sentence and are unrelated to the elements of a crime, *Almendarez-Torres* is the controlling due process authority. *Almendarez-Torres* does not require full due process treatment of an issue of recidivism which enhances a sentence and is unrelated to an element of a crime. *Apprendi* did not overrule *Almendarez-Torres*. The language relied upon by defendant in *Apprendi*, '[o]ther than the fact of a prior conviction,' refers broadly to recidivism enhancements which include section 667.5 prior prison term allegations." (*Id.*, at pp. 222-223; see also *People v. Taylor, supra,* 118 Cal.App.4th 11, 28-29.)

We similarly conclude that the trial court in the case before us did not violate defendant's jury trial rights by finding aggravating circumstances based upon his recidivism. Defendant's prior prison terms and performance on parole arose out of his prior convictions previously found by the trier of fact or admitted by him, may be established by review of court records, and did not relate to commission of the current offense. Therefore, the aggravating circumstances relating to defendant's recidivism were properly relied upon by the court to impose an upper term without affording defendant the right to a jury trial. (*People v. George* (2004) 122 Cal.App.4th 419 [Sept. 15, 2004, D.A.R. 11568, 11573.) We further conclude that defendant's prior convictions, prison terms, and poor performance on parole justified the selection of an upper term, which we are convinced the trial court certainly would have imposed even without finding any facts that require a jury trial under *Blakely*. "California courts have long held

that a single factor in aggravation is sufficient to justify a sentencing choice, including the selection of an upper term . . . ." (*People v. Brown* (2000) 83 Cal.App.4th 1037, 1043.) Here, a multitude of aggravating circumstances established by persuasive evidence were not offset by any mitigating circumstances. Thus, even if the trial court erred in finding aggravating factors, the decision to impose the upper term was constitutionally valid and not prejudicial to defendant. (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1263-1264; *People v. Williams* (1996) 46 Cal.App.4th 1767, 1782-1783.)

DISPOSITION

Accordingly, the trial court is directed to correct the abstract of judgment to award defendant 342 days of sentence credits rather than 339 days, and to forward the corrected abstract of judgment to the Department of Corrections. In all other respects the judgment is affirmed.

Swager, J.

We concur:

Marchiano, P. J.

Margulies, J.